

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEMARAY LLC * October 20 & 21, 2020
*
VS. * CIVIL ACTION NOS.
*
INTEL CORPORATION * W-20-CV-634
SAMSUNG ELECTRONICS, ET AL * W-20-CV-636

BEFORE THE HONORABLE ALAN D ALBRIGHT
TELEPHONIC DISCOVERY HEARING

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

04:01 1 (October 20, 2020, 4:01 p.m.)

04:01 2 MS. MILES: Telephonic discovery hearing in Civil Action
04:01 3 W-20-CV-634 and W-20-CV-636, styled Demaray LLC versus Intel
04:01 4 Corporation and Demaray LLC versus Samsung Electronics Company,
04:01 5 Limited and others.

04:01 6 THE COURT: If I could have announcements from counsel,
04:01 7 please.

04:01 8 MR. MILVENAN: Judge, Rick Milvenan from McGinnis for
04:01 9 plaintiff Demaray, joined by Ben Hattenbach and Maclain Wells
04:01 10 from Irell & Manella.

04:01 11 MR. RAVEL: Your Honor, Steve Ravel for defendant Intel,
04:02 12 along with my client representative John Edwards.

04:02 13 THE COURT: Very good. And what do we have to talk about?

04:02 14 MR. NASH: Good afternoon, Your Honor.

04:02 15 MR. WELLS: So, Your Honor, this is --

04:02 16 MR. NASH: Excuse me, Maclain. I'd like to say hello.

04:02 17 Judge, this is Brian Nash on behalf of Samsung or the
04:02 18 Samsung defendants.

04:02 19 THE COURT: Okay. Thank you.

04:02 20 MR. NASH: I'm happy to -- we were the ones that requested
04:02 21 the conference, Your Honor. So I'm happy to kind of jump in
04:02 22 and let you know the issue that we're dealing with if that
04:02 23 would be helpful.

04:02 24 THE COURT: Please.

04:02 25 MR. WELLS: Your Honor, it's our confidential information.

04:02 1 So we certainly think that it's appropriate for us to go first.

04:02 2 THE COURT: Who just said that? Was it Mr. Milvenan?

04:02 3 MR. WELLS: That was McLain Wells of Irell & Manella.

04:02 4 THE COURT: Okay. I don't care who goes first. So...

04:02 5 MR. WELLS: Well, Your Honor, this is Maclain Wells of
04:02 6 Irell & Manella and I wanted to just give you a breakdown of
04:03 7 where we are.

04:03 8 THE COURT: Okay.

04:03 9 MR. WELLS: So the dispute revolves around the party's
04:03 10 Demaray's preliminary infringement contentions. We prepared
04:03 11 preliminary infringement contentions based upon internal
04:03 12 Demaray documents that are marked attorneys' eyes only under
04:03 13 the interim protective order as well as third party reverse
04:03 14 engineering reports of Intel and Samsung products and the other
04:03 15 contractual obligation to maintain the confidentiality of those
04:03 16 materials. So we designated our preliminary infringement
04:03 17 contentions attorneys' eyes only, as we thought proper.

04:03 18 Now, the Court received the parties' positions regarding
04:03 19 this in the CMC update last week and ruled on this matter on
04:03 20 Friday, and the Court determined that the attorneys' eyes only
04:03 21 confidentiality restriction was too narrow and that the
04:03 22 materials should be treated as confidential, which the Court
04:03 23 said would be sufficient to protect the information while
04:03 24 allowing defendants to confer with their clients.

04:04 25 Now, the Court's interim protective order is clear that

04:04 1 confidential information can be disclosed to in-house counsel
04:04 2 on an as needed basis, other persons in house at defendants
04:04 3 once they're identified and it can be used only for the
04:04 4 purposes of litigating this case. Now, we understand the
04:04 5 Court's order. We're ready to treat the materials exactly as
04:04 6 the Court has suggested.

04:04 7 Now, the other side has come and said they want clarity
04:04 8 regarding the Court's ruling, regarding what restrictions apply
04:04 9 to confidential information. So the dispute is what proper use
04:04 10 defendants can make of Demaray's confidential information.

04:04 11 At the meet and confer on Friday between counsel after the
04:04 12 Court's ruling, defendants took the position that they could
04:04 13 still show this information to third parties such as their
04:04 14 suppliers -- one example of a supplier is Applied Materials --
04:04 15 and use it for any related disputes. It's our position that
04:05 16 that really doesn't provide any protection at all. Applied
04:05 17 Materials has filed a second or a third filed litigation in
04:05 18 California and requested the California court enjoin this Court
04:05 19 from proceeding with this case. And Applied Materials has
04:05 20 indicated that it intends to seek IPRs on the patents and more
04:05 21 than likely will seek to stay the California action. So we
04:05 22 think that it's clear that defendants are trying to leverage
04:05 23 this information to delay the -- to delay the case.

04:05 24 Now, the defendants claim that they are suffering
04:05 25 prejudice because they are unable to prepare a transfer motion,

04:05 1 are unable to prepare invalidity contentions and do a document
04:05 2 collection associated therewith, but they haven't articulated
04:05 3 any reason why the Court's confidentiality designation -- it
04:05 4 impedes their progress on those topics. They can certainly ask
04:06 5 questions and obtain materials on these subjects from their own
04:06 6 personnel as well as third parties without disclosing Demaray's
04:06 7 confidential information. There's nothing exceptional of that
04:06 8 process.

04:06 9 They've already started to claim that they're going to
04:06 10 need schedule extensions for a potential motion to transfer as
04:06 11 well as the invalidity disclosures and document collection
04:06 12 associated therewith. We respectfully submit that the Court
04:06 13 has a proposed schedule using the Court's trial dates of
04:06 14 December 27th, 2001 [sic] and has had it for five days.
04:06 15 Defendants haven't raised any reasonable issues with that trial
04:06 16 date, and the Court should enter the proposed schedule and this
04:06 17 case should proceed.

04:06 18 Thank you, Your Honor.

04:06 19 THE COURT: Okay.

04:06 20 MR. NASH: Your Honor, this is Brian Nash for the Samsung
04:06 21 defendants. May I sort of address the reason why we asked for
04:07 22 this conference?

04:07 23 THE COURT: Sure.

04:07 24 MR. NASH: Okay. I apologize, Your Honor, but that -- I
04:07 25 don't know -- Mr. Wells seems to have sort of gotten ahead of

04:07 1 things because as sort of the fundamental request that the
04:07 2 defendants had on this issue was whether this designation is
04:07 3 proper at all, and I heard him say that this is based off of
04:07 4 confidential RE reports and confidential internal Demaray
04:07 5 documents, and, Your Honor, I don't see that at all, and, in
04:07 6 fact, we submitted these infringement contentions for in camera
04:07 7 inspection, because I've been doing this a long time and I have
04:07 8 never had initial infringement contentions designated
04:07 9 confidential. Now, I could understand if this was somehow
04:07 10 reproducing maybe a confidential RE report or something to that
04:07 11 effect, but I asked opposing counsel in multiple meet and
04:07 12 confers, what is it about this that's confidential? Because I
04:08 13 read the entire document and I honestly couldn't identify a
04:08 14 single thing in my review. And he refused to identify to me
04:08 15 what was confidential in the document. He said the entire
04:08 16 thing's confidential. Its reflects our thinking on it. And I
04:08 17 said, well, I don't understand how that can be possible. These
04:08 18 are what you're accusing us, public language of the patent
04:08 19 versus public documents that you've produced to us, and so I
04:08 20 don't see where that is. He wouldn't do it.

04:08 21 So then I had to go through line by line and grab every
04:08 22 single document that was cited. I did this with Cody Gartman,
04:08 23 and the only document that I could identify that was
04:08 24 confidential appears one time on two different pages. It's at
04:08 25 Pages 10 and 11 of Exhibit B of the infringement contentions.

04:08 1 So two pages out of 61 where I could identify anything that
04:08 2 came from a confidential document. Otherwise there's nothing
04:08 3 in here that reflects any kind of confidential report or RE
04:09 4 report or other internal documentation to Demaray, and,
04:09 5 frankly, for what's been identified and designated as
04:09 6 confidential, I'm not entirely uncertain -- certain why that's
04:09 7 in here anyway because -- and I don't want to get into the
04:09 8 confidentiality of that issue, but it's a 2002 document that
04:09 9 seems to have no bearing at all on Samsung. So I'm not
04:09 10 entirely certain why that's even in this infringement
04:09 11 contention at all.

04:09 12 But leaving that issue aside, I asked them, can you do a
04:09 13 redacted version of this? Can we submit this to our clients
04:09 14 without this purported confidential aspect to it? And they
04:09 15 refused to do that. They said the entire thing's confidential.
04:09 16 And I honestly just can't understand how that is possible, Your
04:09 17 Honor, because a simple read of this document doesn't reflect
04:09 18 anything that's confidential internal to Demaray or otherwise.
04:09 19 It's not confidential business information. It's an accusation
04:09 20 as to why we infringe public claims.

04:09 21 THE COURT: Okay.

04:10 22 MR. WELLS: Your Honor, this is Maclain Wells. May I
04:10 23 respond?

04:10 24 MR. RAVEL: I think -- Maclain, I think it's my turn to
04:10 25 talk before you go again if that's all right on behalf of

04:10 1 Intel.

04:10 2 THE COURT: Mr. Ravel?

04:10 3 MR. RAVEL: Your Honor, on behalf of Intel, I'm going to
04:10 4 drop back, and you've heard the detail, and let me drop back
04:10 5 and provide a little higher level background. This is a case
04:10 6 that has some similarities to DynaEnergetics and to Voip-Pal
04:10 7 versus the world. We don't have just a standard stay or
04:10 8 transfer situation on the elements. We have a competing case.

04:10 9 THE COURT: Mr. Ravel.

04:10 10 MR. RAVEL: Yes.

04:10 11 THE COURT: I'm going to have to put y'all on hold for a
04:10 12 couple of minutes. I just got a note from the jury. They've
04:10 13 reached a verdict in a case I just tried.

04:10 14 Why don't we do this? Why don't we break off for now and
04:11 15 resume this phone call at 4:30 and I'll take you up right where
04:11 16 you're at right now?

04:11 17 MR. RAVEL: Thank you, Judge.

04:11 18 MR. NASH: Very good, Your Honor.

04:11 19 MR. WELLS: Yes, Your Honor.

04:12 20 (Hearing adjourned at 4:12 p.m.)

09:01 21 (October 21, 2020, 9:01 a.m.)

09:01 22 MS. MILES: Telephonic discovery hearing in Civil Action
09:01 23 W-20-CV-634, styled Demaray LLC versus Intel Corporation, and
09:02 24 Civil Action W-20-CV-636, styled Demaray LLC versus Samsung
09:02 25 Electronics Company, Limited, and others.

09:02 1 THE COURT: Good morning. If I could hear -- if I could
09:02 2 have folks announce on the record, please, starting with
09:02 3 plaintiff.

09:02 4 MR. MILVENAN: Your Honor, Rick Milvenan from McGinnis
09:02 5 Lochridge on behalf of Demaray, joined by Ben Hattenbach and
09:02 6 Maclain Wells from the Irell & Manella firm.

09:02 7 THE COURT: Okay.

09:02 8 MR. RAVEL: Your Honor, Steve Ravel for Intel. One riot,
09:02 9 one ranger, one lawyer only, joined by my client John Edwards.

09:02 10 THE COURT: Okay.

09:02 11 MR. NASH: Good morning, Your Honor. Brian Nash here on
09:02 12 behalf of the Samsung defendants. Also one riot, one ranger.

09:02 13 THE COURT: Well, all good. Let me just reboot here for a
09:03 14 second and make sure I understand what's going on. The
09:03 15 position that the plaintiff wants to take here is that its
09:03 16 infringement contentions are confidential and should be
09:03 17 restricted in who can review them; is that correct?

09:03 18 MR. WELLS: That is correct, Your Honor. This is Maclain
09:03 19 Wells.

09:03 20 THE COURT: Yes, sir.

09:03 21 I thought a lot about this last night and I'm not sure I
09:03 22 understand why I would restrict or make those confidential. I
09:03 23 know we talked about this in the past. But, you know, I've
09:03 24 spent a lot of time thinking about this. I have talked to some
09:03 25 of the other judges who handle a lot of patent cases to make

09:03 1 sure I wasn't missing something. But tell me why it is that I
09:03 2 would -- other than I fully understand, for example, if there
09:04 3 is something, let's say, that is Samsung source code or
09:04 4 something in the infringement contentions that itself needs to
09:04 5 be restricted, I get that, but tell me why your infringement
09:04 6 contentions should not be made public, because I'm having a
09:04 7 hard time with that.

09:04 8 MR. WELLS: Yes, Your Honor. So, again, this is Maclain
09:04 9 Wells. So let's start with the basic premise of whether
09:04 10 preliminary infringement contentions can be designated by a
09:04 11 plaintiff to be confidential, and other courts in the circuit
09:04 12 have already answered that question. And the ExitExchange
09:04 13 Corp. v. Casale Media Incorporated, No. 2:10-CV-297 before
09:04 14 Judge Gilstrap answered this question. And Judge Gilstrap said
09:04 15 very clearly that, yes. Preliminary infringement contentions
09:05 16 as a general matter may be confidential and designated
09:05 17 according to the protective order by the plaintiff. And the
09:05 18 Lexis number for that, if it's useful, is 2012 US District
09:05 19 Lexis 40000.

09:05 20 Another example is the Uniloc case that was cited in our
09:05 21 CMC update.

09:05 22 So as a general matter, plaintiffs can designate
09:05 23 preliminary infringement contentions confidential if they
09:05 24 contain confidential information.

09:05 25 Now, in this matter here defendants developed contentions

09:05 1 based upon, one, internal Demaray documents that are marked
09:05 2 attorneys' eyes only under the interim protective order, and
09:05 3 nobody's challenging designation of those internal Demaray
09:05 4 documents. And, again, Demaray's an active company conducting
09:05 5 research and development in the field of thin films, and those
09:06 6 materials helped inform Demaray's contentions that the
09:06 7 defendants' products practiced the patents.

09:06 8 A second basis --

09:06 9 THE COURT: So, Mr. Wells, let me just make sure I'm
09:06 10 following you. And I'm sorry to sound so obtuse. Is it your
09:06 11 position that -- let me start over. My general feeling is that
09:06 12 infringement contentions are not going to be confidential. And
09:06 13 I know you got -- Judge Gilstrap has a case that I'm -- I'm
09:06 14 pretty comfortable that several judges agree with me that --
09:06 15 that as a general matter infringement contentions are not going
09:06 16 to be kept confidential. Is it your position that there is
09:06 17 information specific to these infringement contentions that
09:07 18 within it that itself needs to be maintained and be kept
09:07 19 confidential?

09:07 20 MR. WELLS: Yes, Your Honor. And I would just like to
09:07 21 mention that Judge Gilstrap's not the only judge that has
09:07 22 addressed this. Other judges have addressed this as well in
09:07 23 other districts. I can give you additional citations if you
09:07 24 would like them, but just to be clear, that -- Judge Gilstrap
09:07 25 isn't the only judge that's found that infringement contentions

09:07 1 can be confidential to the plaintiff.

09:07 2 Now, regarding your second question -- or your question as
09:07 3 to whether there are materials in here. Yes. There are
09:07 4 materials. So Demaray developed these contentions based upon
09:07 5 its internal analysis and third party reverse engineering
09:07 6 reports. And, again, the third party reverse engineering
09:07 7 reports are also subject to a contractual obligation to
09:07 8 maintain their confidentiality. And what Demaray did was they
09:07 9 used these materials to figure out basically a fingerprint for
09:08 10 the technology that it could identify and help inform as to
09:08 11 whether or not these patented processes are being used. And so
09:08 12 it -- all of Demaray's contentions are -- that analysis
09:08 13 underlies all of Demaray's contentions in this case. There's
09:08 14 readily available public contentions from Demaray in the
09:08 15 complaint that put forth Demaray -- a public version of
09:08 16 Demaray's infringement allegations. To the extent these
09:08 17 infringement contentions in the -- submitted to the other side
09:08 18 go beyond that, they're confidential in Demaray's opinion.

09:08 19 Now, the interim protective order puts forth the standard
09:08 20 for what's protectable and it says if a party deems that
09:08 21 information to be confidential, it should be protected, and
09:08 22 Demaray certainly believes that both its internal AEO materials
09:08 23 that have been designated and are referenced in the preliminary
09:09 24 infringement contentions and are relied on in making those
09:09 25 contentions as well as the third party reverse engineering

09:09 1 reports that were relied on and produced in the contentions are
09:09 2 confidential.

09:09 3 Now, Mr. Nash brought up the point yesterday that the
09:09 4 contentions don't contain excerpts of these third party reverse
09:09 5 engineering reports, but of course there's no obligation to
09:09 6 recreate those materials in the chart. The important part is
09:09 7 that they are -- contentions are based on and reflect that
09:09 8 information. And protective orders often use the language
09:09 9 referring or relating to confidential information to encompass
09:09 10 just this type of work product.

09:09 11 Your Honor has the VLSI's -- the Intel case before him
09:09 12 that uses exactly that language referring or relating to
09:09 13 confidential information is the information that's protectable.
09:09 14 In this case Demaray relied on the interim protective order.
09:09 15 It has confidential information underlying its contentions, and
09:10 16 it thinks it should be protected.

09:10 17 THE COURT: Okay. Let me hear from Mr. Nash. What is it
09:10 18 that you want to do or not do that is making the plaintiff
09:10 19 unhappy in this case?

09:10 20 MR. NASH: Your Honor, I think this designation is
09:10 21 entirely improper. These are accusations that take the public
09:10 22 language of a patent and say that you infringe this patent and
09:10 23 we believe you infringe it based on your product, and that
09:10 24 should only be information that Samsung is able to review
09:10 25 without any restriction and pass on to its suppliers without

09:10 1 any restrictions.

09:10 2 With all due respect to opposing counsel, this somewhat
09:10 3 sounds trumped up in the sense that they're not even contending
09:10 4 that there's something confidential in this document in terms
09:10 5 of like it's like source code or a copy and paste from some
09:10 6 confidential diagram. What they're saying is that there's an
09:11 7 RE report. They read an RE report which they've never
09:11 8 produced, we've never seen, no one has it, it's not a produced
09:11 9 document. They're saying that that alleged RE report is
09:11 10 somehow confidential. And after they thought about that, then
09:11 11 they could tell that our claims were infringed and that by
09:11 12 virtue of them telling us that our claims are infringed, that's
09:11 13 somehow now confidential? That doesn't make any sense to me at
09:11 14 all.

09:11 15 I've gone through this multiple times trying to identify
09:11 16 what could possibly be considered confidential in here, and,
09:11 17 Your Honor, I believe we submitted it for in camera review.
09:11 18 You can take a look at it yourself, but as you read this, it
09:11 19 says, here's the claim language. Here's why we think Samsung
09:11 20 infringes. And each of those statements is a public -- is
09:11 21 drawn from a public document, and, in fact, all of their
09:11 22 production except for about three documents are public. Two of
09:11 23 those I think arguably relate to maybe conception. I'm not
09:11 24 entirely certain, but the one that they're referring to that I
09:12 25 believe they contend is an internal Demaray document and

09:12 1 Mr. Wells said that we don't challenge that designation or
09:12 2 something like that, I don't think that -- I think it's too
09:12 3 early to say whether we do challenge that designation or not.
09:12 4 It looks to be an internal document, but I can't tell for sure.
09:12 5 It's from 2002, though, Your Honor, and I'm not entirely
09:12 6 certain -- I certainly don't think he's contending that that's
09:12 7 the RE report.

09:12 8 And this internal document that purports to have been
09:12 9 created in 2002, 18 years ago, is somehow informing their
09:12 10 present infringement contentions against Samsung. To me that's
09:12 11 a huge question mark in and of itself, but it's also doubly so
09:12 12 a question as to how that somehow makes these contentions
09:12 13 confidential now in 2020.

09:12 14 That's the -- that's -- ultimately, Your Honor, we
09:12 15 challenge this designation as a starting point because we think
09:12 16 it's improperly made, but at the very least I think that if
09:12 17 they want to maintain this, they need to go through here line
09:12 18 by line and say, this is a -- this statement here is
09:13 19 confidential and this one is -- is not. I mean, that's how you
09:13 20 would typically do this. And otherwise, you know, their broad
09:13 21 interpretation of what would constitute confidential would make
09:13 22 the entirety of a case confidential. Because when I go back
09:13 23 and tell them, you know what? I've looked at this and Samsung
09:13 24 does not infringe. That's going to be based on my own internal
09:13 25 review of Samsung's confidential information. I certainly

09:13 1 won't be taking a position, though, that that blanket
09:13 2 contention that I do not infringe or that Samsung does not
09:13 3 infringe is somehow based on -- is somehow a confidential
09:13 4 contention. The contentions can't be confidential. They may
09:13 5 be based on confidential information, and you're welcome to
09:13 6 blanket that information confidential.

09:13 7 Typically in a case -- and, in fact, in every case I've
09:13 8 ever had, in my experience, the only confidential information
09:13 9 that's involved in an infringement contention is the
09:13 10 defendant's confidential information. I've never seen it where
09:14 11 a plaintiff has been able to shroud its contentions in secrecy
09:14 12 by somehow contending that it's based on their quote/unquote
09:14 13 work product.

09:14 14 THE COURT: Well, we've got -- what we'll do is this.
09:14 15 Josh and I will take a look at the infringement contentions
09:14 16 which we have, and we'll get that -- we'll get that done today
09:14 17 and we'll huddle back up. I just wanted to -- I just wanted to
09:14 18 check again this morning. We were at the end of the trial
09:14 19 yesterday and I was a little scattered when you all were
09:14 20 chatting with me. We'll look at the infringement contentions
09:14 21 and we'll set up something -- a call for tomorrow if we need a
09:14 22 call or we'll just enter a ruling, but essentially the position
09:14 23 plaintiff wants us to take is that they can -- the plaintiff
09:14 24 can maintain marking of confidential on these documents and the
09:14 25 defendants suggest that these infringement contentions should

09:14 1 not be -- there should be no restraint on who the defendant can
09:15 2 show them to.

09:15 3 Is that a fair summary of both sides?

09:15 4 MR. WELLS: Your Honor, one point, if I could make it,
09:15 5 please. This is Maclain Wells.

09:15 6 THE COURT: Sure. Of course.

09:15 7 MR. WELLS: Mr. Nash just stated why he thinks this is not
09:15 8 confidential, but he didn't address what use they want to make
09:15 9 of this information, Your Honor. And, Your Honor, at the meet
09:15 10 and confer on this issue, the defendants said, oh, we need to
09:15 11 have -- be able to give notice to our clients. Well, we
09:15 12 offered to let them disclose this to Intel and to their
09:15 13 suppliers and to Samsung as long as they only used it for the
09:15 14 purposes of this case, but that's not what they want to do.
09:15 15 They want to take these contentions and they want to submit
09:15 16 them in a third filed case in California to the court in
09:15 17 California to try to get that court to enjoin this Court from
09:15 18 proceeding and they want to submit them to the Patent Office to
09:15 19 support IPRs. That's an improper use of this information. So
09:16 20 just to be clear, that's the purpose that they're trying to
09:16 21 achieve. So with that --

09:16 22 And then in addition, if Your Honor would like the
09:16 23 additional cases, I'm happy to support the -- submit those to
09:16 24 you.

09:16 25 THE COURT: Mr. Nash?

09:16 1 MR. RAVEL: Your Honor, before we break, could Intel
09:16 2 respond to that last comment for a couple of minutes?

09:16 3 THE COURT: I was going to invite Mr. Nash to do it, but
09:16 4 if it's you that should do that, I'm welcome to hear you do it.

09:16 5 MR. RAVEL: Your Honor --

09:16 6 MR. NASH: I have a statement, but I'll let Steve go
09:16 7 first.

09:16 8 Go ahead, Steve.

09:16 9 MR. RAVEL: On the issue of the use to which issue Intel
09:16 10 and Samsung want to put these contentions, there is a customer
09:16 11 suit exception lawsuit in ND Cal that is in the nature of a
09:16 12 coverage lawsuit. Applied Materials supplies the tools that
09:16 13 are discussed in the infringement contentions. The smart
09:16 14 lawyers are working a strategy. It's their job. It's
09:17 15 appropriate to try it. It's not appropriate for them to
09:17 16 succeed at it, but they are doing their job trying to muddy the
09:17 17 waters out in their related case out in ND Cal, and the
09:17 18 contested issue out there is, do the allegations relate to the
09:17 19 Applied Material tools or something that Samsung and Intel are
09:17 20 doing, very high level.

09:17 21 What Samsung and Intel would like to do is not only share
09:17 22 these contentions with one representative at each client but
09:17 23 with their supplier Applied Materials, and I think I heard
09:17 24 Mr. Wells say that's okay. And then subject to appropriate
09:17 25 sealing or other protection that Applied and its outside

09:17 1 counsel in ND Cal get to use those to the extent appropriate to
09:18 2 deal with the contested issues in ND Cal, that is overlap.

09:18 3 I, like Mr. Nash, have very little experience with
09:18 4 contentions being made confidential, and I'd like to spend one
09:18 5 second distinguishing the case they mentioned. That is a
09:18 6 throwaway piece of dicta from Judge Gilstrap that says under
09:18 7 certain circumstances contentions can be confidential, but the
09:18 8 actual holding in that case was that it allowed codefendants to
09:18 9 see the contentions against other codefendants. There's about
09:18 10 four words of dicta that they're hanging their hat on here.
09:18 11 And just what's fair is for Intel and Samsung's indemnitor to
09:18 12 be able to use what's available to them to fight this overlap
09:18 13 issue out in ND Cal.

09:18 14 I think that our first line position is that they're not
09:19 15 protected at all, but I think the other side tried to muddy the
09:19 16 waters about the extent to which we want to use them, and it is
09:19 17 our clients on a need to know basis, Applied on a need to know
09:19 18 basis, and Applied's outside lawyers on a need to know basis,
09:19 19 which is about as protected as I've ever seen contentions be,
09:19 20 Judge.

09:19 21 And if Mr. Nash wants to add, you know, I'm just a dog
09:19 22 watching TV in these kind of cases and he's an engineer. So
09:19 23 I'd be happy to -- for him to backstop me there.

09:19 24 THE COURT: Okay. Mr. Nash?

09:19 25 MR. NASH: Yes, Your Honor. I just wanted to point out

09:19 1 that I think the issue to which Mr. Wells just spoke is a
09:19 2 little bit of the cart getting ahead of the horse. I think the
09:19 3 first predicate question has to be, is this a proper
09:19 4 designation or not? I certainly would be willing to address
09:19 5 Your Honor. If Your Honor agrees that this is a proper
09:20 6 designation and these should be treated confidential, I'd be
09:20 7 happy to address the secondary question that follows that,
09:20 8 which is, who can see them and for what purpose? But I don't
09:20 9 want to busy Your Honor's morning. I know you've got a lot of
09:20 10 things on the docket today. So I was planning to just table
09:20 11 that issue until you've had an opportunity to determine whether
09:20 12 or not the designation's proper. Would you like me to address
09:20 13 it now, Your Honor, or should we wait?

09:20 14 THE COURT: No. Go ahead, please.

09:20 15 MR. NASH: So I agree with what Mr. Ravel was articulating
09:20 16 which is that to the extent we do reach a confidentiality
09:20 17 determination, at a minimum in what we've asked opposing
09:20 18 counsel to allow us to do is to share the contentions
09:20 19 themselves. We asked them to do a redacted version. They
09:20 20 refused. We said, well, we can't inform our client as to where
09:20 21 the accusations are, how to look for documents, how to
09:20 22 determine what might be relevant prior art, given how these
09:20 23 claims are being construed, and importantly, you know, what
09:21 24 type of indemnity relationships might be involved because as I
09:21 25 don't think it's a confidential statement to make, these are

09:21 1 directed exclusively at products that Samsung and Intel don't
09:21 2 make. These are tools that they use. And there's nothing
09:21 3 specific in these contentions about anything that Samsung or
09:21 4 Intel does with those tools other than that they have them.
09:21 5 The tools are made by Applied, and we need to be able to share
09:21 6 those with Applied because they're the ones that have that
09:21 7 information about, you know, what's being accused here with
09:21 8 respect to infringement. So we need to be able to pass that on
09:21 9 to Applied and, importantly, to Applied's attorneys as well.
09:21 10 And that's really the simple -- the simple issue of what we
09:21 11 want to be able to do with these.

09:21 12 I will say that with respect to the first issue the
09:21 13 predicate question of answering whether or not these are
09:21 14 properly designated, it may assist the Court to have the
09:21 15 documents that are cited as part of these contentions, and I'd
09:22 16 be happy to send those for in camera review as well. We
09:22 17 forwarded the contentions, but they reference documents. It's
09:22 18 not apparent in anything on those sort of contentions
09:22 19 themselves whether those documents are public or not, but the
09:22 20 documents would reveal that information. So when, for example,
09:22 21 it says like a Bates range, you'll pull them up and they'll be
09:22 22 like -- it'll be a public brochure that Applied Materials makes
09:22 23 available on its website. So if it would help Your Honor, I
09:22 24 would be happy to -- I think Cody Gartman would be happy to set
09:22 25 up an FPT link to provide documents for your inspection as

09:22 1 well.

09:22 2 THE COURT: Okay.

09:22 3 MR. WELLS: And, Your Honor, could I briefly respond?

09:22 4 This is Maclain Wells.

09:22 5 THE COURT: Mr. Wells, you've got eight minutes. So...

09:22 6 MR. WELLS: Thank you. Thank you, Your Honor.

09:22 7 So, first, with regard to Mr. Ravel's comments on the

09:22 8 cases and the case law, Judge Gilstrap's opinion is not a

09:23 9 throwaway opinion. In that case he actually upheld the

09:23 10 confidentiality designation of the preliminary infringement

09:23 11 contentions, but he said that you could share them for the

09:23 12 purposes of that case with the other defendants, and that's

09:23 13 something that's entirely consistent with what we're

09:23 14 suggesting.

09:23 15 In addition, that case has been cited by other subsequent

09:23 16 cases for exactly this proposition, including the Uniloc case

09:23 17 cited in the CMC update that was submitted last Thursday. So

09:23 18 this isn't a throwaway or one-off decision.

09:23 19 Regarding Mr. Nash's points that there's nothing about

09:23 20 what defendants do with these tools that's accused, one of the

09:23 21 patents is a method patent that says using these reactors in a

09:23 22 certain way. And Samsung and Intel are the ones that do that.

09:23 23 So that's just not an accurate statement.

09:23 24 Now, we believe that these materials are protected, and

09:23 25 that's the standard that's put forth in the interim protective

09:24 1 order under which we were operating at the time this was
09:24 2 produced, and that interim protective order says explicitly
09:24 3 that they shall be used for this case and this case alone.
09:24 4 That's -- that is the interim protective order. Now, if the
09:24 5 other side wants to show them to their supplier and their
09:24 6 supplier agrees to be bound by the confidentiality obligations
09:24 7 as well as the use limitations in the interim protective order,
09:24 8 we're okay with that. If they want to disseminate it within
09:24 9 their clients, again, subject to those limitations on a need to
09:24 10 know basis and for the use in this case, we're okay with that.
09:24 11 But the Northern District of California has its own patent
09:24 12 rules, its own disclosures. It's going to handle its own case.
09:24 13 And it's inappropriate to leverage this in the Northern
09:24 14 District of California to the prejudice of our client and
09:24 15 change the interim protective order after the fact.

09:25 16 MR. NASH: Your Honor, this is Brian Nash. I -- in the
09:25 17 four minutes that remain, could I briefly respond to the last
09:25 18 statement that Mr. Wells made?

09:25 19 THE COURT: Sure. There are a lot of people who are
09:25 20 waiting to be sentenced I'm sure who won't mind if I'm a minute
09:25 21 or two late.

09:25 22 MR. NASH: I'm so sorry about that, Your Honor. I just --

09:25 23 THE COURT: No. I'm kidding. They will -- they're good.
09:25 24 They'll wait.

09:25 25 MR. NASH: I'm so sorry, Your Honor.

09:25 1 There are matters of life and death at issue. I
09:25 2 appreciate that. Much more important than patent cases.

09:25 3 I just want to point out what's improper here is in the
09:25 4 Northern District of California the plaintiff is trying to take
09:25 5 an inconsistent position with what it's taking here. I'm not
09:25 6 involved in the Northern District of California case. I don't
09:25 7 represent Applied. I honestly don't know the specifics, but
09:25 8 I've looked enough at the public pleadings to understand that
09:25 9 what they're trying to do in that case is oppose the relief
09:25 10 requested by Applied by saying, oh, well, that's not
09:26 11 necessarily what's going on in the Western District of Texas,
09:26 12 Your Honor. And then they clouded everything in secrecy here
09:26 13 in the Western District of Texas by designating it confidential
09:26 14 improperly so so that there's no ability for the Applied
09:26 15 attorneys to respond to that with the information here and that
09:26 16 judge isn't able to know what's going on here. If this -- if
09:26 17 we want to talk about what's inappropriate, it's trying to
09:26 18 cloud this case in secrecy so that they can take an
09:26 19 inconsistent position in the Northern District of California.

09:26 20 That's all I had, Your Honor.

09:26 21 THE COURT: Anything else, gentlemen?

09:26 22 MR. MILVENAN: Yes, Your Honor. This is Rick Milvenan.
09:26 23 If I could just take one minute to point out that Ms.
09:26 24 Santasawatkul gave us a Markman date and a trial date and we
09:26 25 submitted a schedule last Friday and we would like to see that

09:26 1 schedule get entered.

09:26 2 THE COURT: Why don't you just ping Josh and make sure he
09:26 3 does it?

09:27 4 MR. MILVENAN: Will do.

09:27 5 THE COURT: Yeah. I'm surprised he didn't -- maybe
09:27 6 just -- we've got a lot of stuff going on, but just -- you
09:27 7 know, double-check with him and we'll get it ordered. I'm
09:27 8 sorry. We'll get it entered.

09:27 9 MR. NASH: Your Honor, the parties are still meeting and
09:27 10 conferring about that. There's no agreement on the schedule at
09:27 11 this point. That's why this hasn't been submitted to Your
09:27 12 Honor yet. We're still talking.

09:27 13 THE COURT: It's not been submitted?

09:27 14 MR. NASH: It has not.

09:27 15 MR. MILVENAN: It was sent to Hannah on Friday, and the
09:27 16 dates for the Markman and trial date were given to us by the
09:27 17 Court.

09:27 18 MR. NASH: We were asked to meet and confer about a
09:27 19 schedule. I think we're still in the process of doing that.

09:27 20 MR. RAVEL: And just to be a little more specific, Judge,
09:27 21 what sort of interim relief we might need in terms of motions
09:27 22 to transfer and accused product discovery, now that we're on
09:28 23 the 12th day of trying to get infringement contentions that we
09:28 24 can actually use, the plaintiffs are anxious to try to
09:28 25 characterize the defendants as trying to delay this case.

09:28 1 Nothing could be further from the truth. It's more a matter of
09:28 2 what would be fair in terms of interim deadlines, given how
09:28 3 hard we're having to work to get contentions that we can use.
09:28 4 I think that Mr. Nash and I have a pretty good record of as
09:28 5 defendants not standing in the way of cases getting resolved,
09:28 6 and that's -- to the extent that there's an implication to the
09:28 7 contrary, I just wanted to clear that up a little bit.

09:28 8 THE COURT: Well, let's do this. Let's do this. If we do
09:28 9 not have -- Mr. Milvenan, if this is an agreed order for us to
09:29 10 sign, we'll be happy to do it. If it's not and if you all
09:29 11 don't have an agreed scheduling order in place -- not in place,
09:29 12 but if you all cannot come to an agreement on everything that
09:29 13 needs to be agreed to by the end of this week, Mr. Milvenan,
09:29 14 let Josh know and I will set another scheduling conference --
09:29 15 another scheduling conference and I'll take up any disputes you
09:29 16 all have about any issues and we'll get an order entered next
09:29 17 week.

09:29 18 So I've got a trial that starts Monday, but I can find a
09:29 19 time somewhere in -- you know, somewhere Monday, Tuesday or
09:29 20 Wednesday and we'll set a hearing and we'll just go through
09:29 21 everything that's in dispute and we'll get it all worked out if
09:29 22 y'all can't. So...

09:29 23 MR. MILVENAN: Thank you, Your Honor.

09:29 24 THE COURT: You bet.

09:30 25 Anything else?

09:30 1 MR. NASH: No. That's it, Your Honor.

09:30 2 MR. RAVEL: Thank you, Your Honor.

09:30 3 MR. WELLS: Thank you, Your Honor.

09:30 4 THE COURT: Take care. Bye.

09:30 5 (Hearing adjourned at 9:30 a.m.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4 I, Kristie M. Davis, Official Court Reporter for the
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